STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF FLINT,
Public Employer-Respondent,

-and-

Case No. C13 D-062
Docket No. 13-001086-MERC

FLINT POLICE OFFICERS ASSOCIATION OF MICHIGAN,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Giarmarco, Mullins & Horton, P.C., by John C. Clark, for Respondent

Leonard & Kruse, P.C., by Norbert B. Leonard and Kelly A. Kruse, for Charging Party

DECISION AND ORDER

On September 24, 2013, Administrative Law Judge David M. Peltz issued a Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service and no exceptions have been filed by any of the parties.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the Administrative Law Judge as its final order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Edward D. Callaghan, Commission Chair

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Robert S. LaBrant, Commission Member

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Natalie P. Yaw, Commission Member

Dated: _____

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

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DECISION AND RECOMMENDED ORDER ON SUMMARY DISPOSITION

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was assigned to David M. Peltz, Administrative Law Judge (ALJ) of the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission (MERC). I make the following findings of fact and conclusions of law based upon the pleadings and briefs filed by the parties in this matter.

The Unfair Labor Practice Charge and Procedural History:

This case arises from an unfair labor practice charge filed on April 10, 2013 by the Flint Police Officers Association of Michigan (FPOA) against the City of Flint. The charge concerns the City's decision to unilaterally eliminate Employer funding for the position of full-time Union president. Initially, the Union asserted that the elimination of release time for the FPOA president constituted an unlawful modification of the status quo during the pendency of Act 312 proceedings. On July 22, 2013, the Union filed an amended charge which omitted any reference to the Act 312 status quo argument.[1] Instead, the FPOA asserted that the City forced the Union president to return to full-time patrol duty in retaliation for the Union's earlier attempts to

[1] In a decision issued on June 14, 2013, the Commission held that a public employer which is in receivership has no obligation to participate in compulsory arbitration under Act 312. *City of Detroit*, 27 MPER 6 (2013). That decision would appear to obviate any finding that the City of Flint was obligated to maintain the status quo during Act 312 proceedings.

challenge actions taken by the City's emergency manager, including the emergency manager's issuance of Order No. 18 which modified or eliminated several sections of the parties then existing collective bargaining agreement.

On August 19, 2013, Respondent filed a motion for summary disposition, asserting that the decision to eliminate Employer funding for the full-time Union president position was made pursuant to an order lawfully issued by the emergency manager. The City asserts that the action was based upon legitimate law enforcement concerns and that, in any event, the Commission lacks the authority to modify an order issued by an emergency manager pursuant to the Local Financial Stability And Choice Act, PA 436 of 2012, MCL 141.1541 *et seq*. (PA 436) or its predecessor, the Local Government & School District Fiscal Accountability Act, Public Act 4 of 2011, MCL 141.1501 *et seq* (PA 4). Charging Party filed a response to the City's motion for summary disposition on August 28, 2013. The City filed a reply brief on September 13, 2013. Neither party requested oral argument in this matter.

Findings of Fact:

The following facts are derived from the unfair labor practice charge, the amended charge, and the Union's response to the City's motion for summary disposition, as well as the assertions set forth by the Employer in its motion for summary disposition and the attachments thereto which were not specifically disputed by the Union. Charging Party represents a bargaining unit consisting of patrol officers employed by the City of Flint. Article 4 of the most recent collective bargaining agreement between the parties provides for the establishment of an Employer funded full-time Union president position. Specifically, that section provides, in pertinent part:

> The President, or the Vice President in the absence of the President, shall work from 8:00 A.M. to 4:30 P.M., Monday through Friday, for which he will be paid by the City eight (8) hours per day, forty (40) hours per week. His only duties during these hours will be Union business as it pertains to the Police Officers' Unit of the Flint Police Department.

In 2011, Rick Synder, Governor of the State of Michigan, and the Michigan Department of Treasury appointed Michael Brown emergency manager for the City of Flint pursuant to PA 4. On April 24, 2012, Brown issued Order No. 18, which provided for the modification of certain sections of the then existing collective bargaining agreement, including the elimination of Article 4 of the contract. In the order, Brown asserts that he is acting pursuant to the authority granted to him by Section 19(1) of PA 4, which gives an emergency manager the right to "make, approve or disapprove" any contract and the authority to "terminate 1 or more terms and conditions of an existing collective bargaining agreement."

Upon the issuance of Order No. 18, the City implemented various modifications to the terms and conditions of employment for bargaining unit members. However, no changes were made to the Union president position during Brown's tenure as emergency manager, which ended in November of 2012, when Ed Kurtz was appointed as Brown's replacement. On January 10, 2013, the FPOA filed a lawsuit in Genesee County Circuit Court challenging the

issuance of Order No. 18 by the former emergency manager and the changes which resulted therefrom. As a remedy, the Union sought an injunction ordering the City to cease and desist from imposing the terms and conditions of Order No. 18 upon bargaining unit members.

On March 8, 2013, the City's Chief of Police, Alvern Lock, issued a memorandum concerning the elimination of Article 4 of the parties' collective bargaining agreement. Referencing the previously issued Order No. 18, the memorandum provided that effective March 11, 2013, the current Union president, Mark Smith, was to report to the patrol bureau in "full uniform" and that he would be required to work from 8:00 a.m. until 4:00 p.m. in a "patrol capacity." Pursuant to the memorandum, Smith would be allowed to conduct union business "only as needed with the permission of the shift commander."

Smith reported for patrol duty on March 11, 2013 in compliance with the Lock memorandum. During the weeks which followed, Smith requested on several occasions permission to conduct Union business, including time to prepare for the upcoming Act 312 hearing. These requests were sometimes granted, but often denied by Respondent. There were also multiple instances in which Smith's patrol assignment interfered with his ability to conduct Union business.

The Lock memorandum was issued around the same time that the parties were preparing for the commencement of Act 312 hearings and during the pendency of various grievance arbitration proceedings. A few days prior to the issuance of the Lock memorandum, Smith was present during a district court hearing at which former emergency manager Brown was expected to testify concerning various financial issues related to the operation of the City. Following the hearing, Smith was advised by an unspecified City employee that Brown "wrongly assumed" that the Union president was "simply wasting time sitting in court." Brown was later reappointed as emergency manager for the City of Flint beginning in July of 2013.

Discussion and Conclusions of Law:

Effective March 16, 2011, PA 4 was enacted by the Legislature for the stated purpose of placing financial checks and balances on public employers in a state of financial stress or emergency. Section 26(3) of the Act suspended the duty to bargain set forth in Section 15(1) of PERA for municipalities which were placed in receivership due to the appointment of an emergency manager. Although PA 4 was later repealed by popular vote, Order No. 18, which modified or eliminated several sections of the parties' then existing collective bargaining agreement, was lawful at the time of its issuance on April 24, 2012 and, therefore, established the status quo with respect to the issue of release time for the Union president and other terms and conditions of employment. In *City of Detroit*, Case No. C12 I-178; Docket No. 12-001591-MERC, issued on January 29, 2013, Administrative Law Judge Julia Stern found that the subsequent repeal of PA 4 by referendum did not invalidate actions lawfully undertaken while

the statute was in effect and I agree with her conclusion as applied to these facts.[2] In any event, PA 4 was ultimately replaced by PA 436. Effective March 28, 2013, PA 436 similarly suspends the duty to bargain set forth in Section 15(1) of PERA where an emergency manager is in place. See MCL 141.1567(3). Accordingly, it would appear that Charging Party's challenge to Order No. 18 is, as a practical matter, moot.

The remaining issue in this matter pertains to the March 8, 2013 memorandum from the chief of police requiring the Union president to report to patrol duty on a full-time basis. Charging Party asserts that the order was issued in retaliation for the Union's attempts to challenge actions taken by the emergency manager. The City contends that this allegation must be dismissed because even if it is determined that the decision constituted an unfair labor practice under PERA, the Commission lacks the authority to modify orders issued by the emergency manager and, therefore, the Union has no adequate remedy at law. I disagree. Although the Legislature suspended the duty to bargain set forth in Section 15(1) of PERA for municipalities subject to an emergency manager, neither PA 4 nor PA 436 modified or suspended PERA's prohibition on retaliation or discrimination on the basis of protected concerted activity. Furthermore, the Commission has previously held that a decision about which there is no duty to bargain may nevertheless be unlawful if the employer's actions are motivated by anti-union animus. See *Southfield Pub Schs*, 25 MPER 36 (2011) (although a subcontracting decision is a prohibited subject of bargaining under Sections 15(3)(f) and 15(4) of PERA, where unlawful discrimination is alleged the issue is to be resolved by determining whether the decision was based on the employer's legitimate business concerns or on an unlawful desire to terminate the union's representation of the employees). See also *Detroit Public Schools*, 25 MPER 84 (2012); *Coldwater Cmty Schs*, 2000 MERC Lab Op 244; *Parchment Sch Dist*, 2000 MERC Lab Op 110 (no exceptions).

Although the suspension of the duty to bargain does not, by itself, obviate a claim for unlawful discrimination under PERA, it appears that the instant charge must nevertheless be dismissed on the basis that Charging Party has failed to set forth any factually supported allegation which would establish that the City retaliated against the Union in violation of Sections 10(1)(a), (b) or (c) of PERA. Charging Party asserts that the City's decision to require the Union president to report to patrol duty on a full-time basis was motivated by the FPOA's efforts to challenge the emergency manager's issuance of Order No. 18 on April 24, 2012. That order eliminated or modified many of the provisions of the then existing collective bargaining agreement between the City and the FPOA, including the elimination of Article 4 which specified that the president of the Union was an Employer funded full-time position. It was that order upon which the police chief relied in issuing his March 8, 2013, directive implementing the earlier order. I find that no inference of unlawful motive can be drawn from an employer's implementation of a previously announced decision to take the precise action which the Union now asserts was retaliatory.

[2] The same argument was recently asserted in an action brought by retired City of Pontiac employees challenging the emergency manager's power to reduce their retirement benefits. In *City of Pontiac Retired Employees Ass'n v Schimmel*, Docket No. 12-2087, issued August 9, 2013, the United States Court of Appeals for the Sixth Circuit remanded to allow the District Court to consider whether the voters' referendum on PA 4 voided actions taken by the emergency manager pursuant to that Act. That matter remains pending.

In an attempt to establish anti-union animus, Charging Party points to the fact that the FPOA was the only labor organization which failed or refused to come to an agreement with Respondent on contract modifications and argues that none of the other City unions "had their President's position effectively eradicated." Union release time is a creature of contract. The Commission has long held that paid time off to engage in union business is a privilege to be negotiated and not a right guaranteed by Section 9 of the Act. See e.g. *District Health Department No. 2*, 26 MPER 42 (2013); *City of Detroit*, 23 MPER 54 (2010); *Belding Area Schs*, 20 MPER 105 (2007) (no exceptions). Given that the other labor organizations representing City employees agreed to terms and conditions of employment acceptable to the emergency manager, it stands to reason that those unions were able to negotiate the retention of provisions concerning paid time off for their respective officers and representatives. In any event, the FPOA is a police union, and Respondent submitted as an attachment to its motion an affidavit from Chief Lock in which Lock asserted that the decision to return the Union president to road patrol was based on concerns over inadequate staffing and an increase in crime activities. Charging Party failed to make any offer of proof suggesting that it is capable of contradicting Lock's claim which, regardless, appears on its face not only plausible but a rational action by a police department within a municipality facing a legitimate financial crisis. I find that Charging Party has presented no plausible basis for a finding that the employer's decision to assign Smith to patrol duties was mere pretext.

In a further attempt to prove that Respondent engaged in unlawful retaliation or discrimination, Charging Party asserts that the decision to order the FPOA president to return to patrol occurred just days after then former emergency manager, Michael Brown, saw the Union president at a hearing in district court. Charging Party contends that the FPOA president was later advised by an unspecified City employee that Brown "wrongly assumed" that the Union president was "simply wasting time sitting in court." Charging Party's attempt to connect this event to the memorandum issued by the police chief several days later constitutes nothing more than speculation and conjecture, particularly given the fact that Brown was not emergency manager at or around the time the memorandum was issued. Although anti-union animus may be proven by indirect evidence, mere suspicion or surmise will not suffice. Rather, the charging party must present substantial evidence from which a reasonable inference of discrimination may be drawn. *Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974); *City of Grand Rapids (Fire Dep't)*, 1998 MERC Lab Op 703, 707. The Commission has repeatedly held that suspicious timing is not sufficient, by itself, to establish hostility toward an employee's exercise of protected activity. See e.g. *City of Detroit (Water & Sewerage Dept)*, 1985 MERC Lab Op 777, 780.

I have carefully considered the remaining arguments of the Union and conclude that they do not warrant a change in the result. For the reasons stated above, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The unfair labor practice charge filed by the Flint Police Officers Association of Michigan against the City of Flint in Case No. C13 D-062; Docket No. 13-001086-MERC is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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David M. Peltz
Administrative Law Judge
Michigan Administrative Hearing System

Dated: September 24, 2013